

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPETITIVE PRODUCT PRICES
INBOUND PARCEL POST (AT UPU RATES)

Docket No.
CP2021-47

**RESPONSE OF THE UNITED STATES POSTAL SERVICE
TO CHAIRMAN'S INFORMATION REQUEST NO. 1**
(January 5, 2021)

The United States Postal Service (Postal Service) hereby responds to
Chairman's Information Request No. 1, issued on December 23, 2020. The question is
stated verbatim and is followed by the response.

Respectfully submitted,

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Please refer to the Postal Service's Application for Non-Public Treatment¹ where the Postal Service avers that it would likely suffer commercial harm if "portions of the rate charts..." were disclosed, including the statement that "competitors would be able to take advantage of the information to offer lower pricing to customers (which can include foreign posts, which are not required to use the Postal Service for delivery of parcels destined to the United States)...." Please also refer to the comments filed by the U.S. Chamber of Commerce and National Association of Manufacturers² where they aver "[t]he rates in the [Universal Postal Union (UPU)] circular are hardly a secret. They are available to anyone, including non-members, who participates in the UPU Councils or Committees [including other private actors who are involved in the UPU]."

Please reconcile these statements, explain the apparent contradiction in the Postal Service's Application for Non-Public Treatment and the statements in the U.S. Chamber and NAM Comments concerning how these rates are treated at the UPU, and how the Postal Service's examples of harm would be realized if only the rates at issue were made public (as opposed to the costs, full financial workpapers, or Governors' Decision No. 19-1). If necessary, please amend the Application for Non-Public Treatment and/or redacted versions of the financial workpapers filed in the instant docket.

RESPONSE:

Inward land rates (ILRs) are based on the validation of parcel service features as prescribed in articles 32-201 and 32-202 of the Universal Postal Union (UPU) Convention Regulations and Postal Operations Council resolution CEP 3/2019.1. The 2021 ILRs are based on the number of service features provided by designated operators (DOs); on the achievement of performance targets, where relevant; and on any requests for inflation adjustments submitted by DOs in accordance with the conditions stipulated in article 32-202 of the Convention Regulations, as verified by the UPU's International Bureau (IB). The UPU distributes ILRs via Circular and stores them

¹ Notice [of the United States Postal Service of Filing Changes in Rates Not of General Applicability for Inbound Parcel Post (at UPU Rates), and Application for Non-Public Treatment, December 11, 2020], Attachment 1 at 4-5.

² Comments of the U.S. Chamber of Commerce & National Association of Manufacturers, December 21, 2020, at 3 (U.S. Chamber and NAM Comments).

in a password protected section of its website, where the log-on page stipulates the following: “Connect to this portal to access services reserved to UPU members” and “[a]ccess to this portal is restricted to UPU members only.”³ Parties with an assigned password can access the IB Circulars, along with the rates that they contain; parties without an assigned password who wish to access them must submit a request to the UPU and obtain the UPU’s approval.⁴ Furthermore, the UPU website’s “Contact Us” page⁵ answers the question, “How can I access the UPU Documentation Centre?”—where data including, inter alia, the Circulars with the ILRs are stored—as follows:

Staff members of the designated operators, postal regulator bodies, governmental authorities, embassies and permanent missions of UPU member countries may be granted access to the UPU Documentation Centre. Members of UPU associated bodies, such as the Consultative Committee, and Restricted Union staff listed in the UPU’s “List of Senior Postal Officials” are also eligible.

This system of portals, gate-keeping functions, and enumerated lists both embodies and enacts a policy that guards sensitive business information from public disclosure; moreover, it includes ILRs among the types of information warranting such protections. The UPU has therefore established a mode of controlled access, which grants a measure of discretion over how, when, and in relation to whom the seal of confidentiality is lifted. The UPU has a valid policy justification for doing so, and the Postal Service has a sound legal basis for participating in the system that the UPU maintains.⁶

³ <https://auth.pspac.post/my.policy>.

⁴ The following webpage presents a case in point: <https://www.upu.int/en/Postal-Solutions/Programmes-Services/Remuneration/ILRs-and-ECOMPRO-rates>. Users may follow its prompt to IB Circular 148/2020; when they do so, they are directed to a portal which requires a password (<https://auth.pspac.post/my.policy>). This serves as a practical illustration that the UPU does not intend the rates contained in that Circular to be made public.

⁵ <https://www.upu.int/en/Contact-us/Requests-for-information>.

⁶ Chairman’s Information Request No. 1 specifically asks: “If necessary, please amend the Application for Non-Public Treatment and/or redacted versions of the financial workpapers filed in the instant docket.” The Postal Service interprets this to refer to USPS inward land rates that were redacted in the financial

The UPU's General Regulations obligate the UPU's International Bureau to ensure the protection of member countries' commercial data. Specifically, Article 132.5 of the General Regulations states that "[t]he International Bureau shall ensure the confidentiality and security of commercial data provided by member countries and/or their designated operators for the performance of its duties arising from the Acts or decisions of the Union." In an appended Commentary, the UPU General Regulations explain the policy rationale underlying this Article:

Member countries and DOs provide the IB with information on the postal service. As this information includes confidential commercial data (concerning quality of service, terminal dues, etc.), and given their status as commercial entities, as well as requirements stemming from member countries' national legislation, the IB needs to be able to guarantee the confidentiality of data provided by any legal entity (member countries and DOs).⁷

The Postal Service believes that the materials filed under seal with its initial filing in this docket,⁸ pertaining to the establishment of prices and classifications not of general applicability for Inbound Parcel Post (at UPU Rates), constitute commercial data in which postal operators retain a proprietary interest. That such rates are disseminated via UPU Circular does not suffice to mitigate or suspend the confidentiality and security of commercial data of member countries' operators, since the member countries and DOs whose confidentiality the International Bureau is tasked with protecting first provide that data to the UPU (e.g., data on service performance on which rates are based). The

workpapers, and not to the inbound rates of other countries' postal operators, which are not in the financial workpapers and which would be sensitive to third parties.

⁷ UPU Constitution and General Regulations Manual, Rules of Procedure, Legal status of the UPU, With commentary by the International Bureau, List of resolutions and decisions, Berne 2018, available at <https://upu.int/getmedia/29daffd7-da8d-4e4c-88e9-44fb73f32e5d/actInThreeVolumesConstitutionAndGeneralRegulationsEn.pdf>, at B.36 and B.37.

⁸ Notice of the United States Postal Service of Filing Changes in Rates Not of General Applicability for Inbound Parcel Post (at UPU Rates), and Application for Non-Public Treatment, Docket No. CP2021-47, December 11, 2020.

requests of the U.S. Chamber of Commerce and National Association of Manufacturers would therefore conflict not only with the terms under which access was provided, but also with the UPU's General Regulations; it would, moreover, trigger the release of data over which postal operators may have compelling reasons to exercise a measure of control.

For similar reasons, the Commenters' assertion that "[t]he rates in the UPU circular are hardly a secret. . . [but] are available to anyone, including non-members, who participates in the UPU Councils or Committees,"⁹ is unavailing. Member countries, DOs, and certain other parties to the UPU (e.g., IB staff) may, as the Commenters assert, access the data that the United States Postal Service has sought to protect; the UPU may, moreover, share some of these data with members of the Consultative Committee, which includes within its ranks members who are not postal operators. There is nevertheless a distinct difference between absolute secrecy and regulated confidentiality, and the UPU, as mentioned above, allows a certain amount of access to confidential data for limited purposes and use, through a channel of dissemination that controls access without foreclosing it to all.

This distinction finds support in United States law. For example, the conveyance of certain information to some select parties does not constitute a disclosure sufficient to waive an otherwise applicable FOIA Exemption. Such a disclosure must amount to an "official acknowledgment" of protected information and/or to the publication of protected information "in the public domain." Davis v. DOJ, 968 F. 2d 1276, 1279 (D.C. Cir. 1992). Among the elements necessary to prove that an official public disclosure has occurred,

⁹ Comments of the U.S. Chamber of Commerce & National Association of Manufacturers, Docket No. CP2021-47, December 21, 2020, at 1.

the D.C. Circuit requires the information in dispute to be “made public through an official and documented disclosure.” Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (citing Afshar v. Dep’t of State, 702 F. 2d 1125, 1130-33 (D.C. Cir. 1983)); see, e.g., ACLU v. DOD, 628 F.3d 612, 620-21 (D.C. Cir. 2011) (same); Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (same); Public Citizen v. Dep’t of State, 11 F.3d 198, 202 (D.C. Cir. 1995) (same). That certain parties in the UPU’s Consultative Committee (to take but one example of limited disclosure) may be privy to password protected information hardly meets the criterion of “official and documented disclosure.” Rather, the controlled distribution of ILRs more closely resembles the facts adjudicated in Aviation Consumer Action Project v. Washburn, 535 F. 2d, 101 (D.C. Cir. 1976), where the disclosure of a memo to an advisory committee was found not to have made that memo public information, since “[FOIA Exemption 5]” is designed to encourage a free and candid exchange of ideas during the process of decision-making . . .” Id. at 107-08. Furthermore, that the UPU has constructed a system of access portals, described above, strongly indicates that parties who access protected information may not themselves freely publish that information to the public domain; for to do so would be to circumvent, indeed to undermine, the balance of safeguards and flows that both facilitates the exchange of sensitive commercial information, and protects the parties authorized to engage in such exchanges. In short, even if some members of the private sector enjoy circumscribed access to ILRs for certain limited purposes, that does not change their character as nonpublic, sensitive business information.

Finally, the Postal Service disputes the Commenters’ claim that the rates in International Bureau Circular 148 (Oct. 12, 2021) “are not sensitive business information

that is in any way proprietary to the USPS,” as well as the accompanying suggestion that their publication would inflict no financial harm on the Postal Service.¹⁰ The rates constitute information of a commercial nature that would not be disclosed under good business practices. They would grant a windfall to competitors who, if they could obtain the information in question outside the UPU’s prescribed channels and not subject to any confidentiality restrictions, could offer lower pricing to customers based on knowledge of the rates, while subsidizing any losses with profits from other customers. Eventually, this could freeze the Postal Service out of the relevant inbound delivery services market.

¹⁰ Comments of the U.S. Chamber of Commerce & National Association of Manufacturers, Docket No. CP2021-47, December 21, 2020, at 1.